BANK INDUSTRI & TEKNOLOGI MALAYSIA BHD A

v.

ALOM BUILDING SYSTEMS SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING B
CLEMENT SKINNER J
[COMPANIES WINDING-UP NO: 28-13-2004-I]
4 MAY 2006

COMPANY LAW: *Winding-up - Petition - Application to set aside substituted petitioner - Whether substituted petitioner had right to present petition when original petition was presented - Whether substituted petitioner should have first issued statutory notice - Whether oral application for substitution procedurally correct - Whether High Court in Sabah and Sarawak had jurisdiction to hear petition - Whether service of amended petition at business address proper - Companies Act 1965, ss. 217(b), 218(2)(a), 219(a) - Winding-Up Rules 1972, rr. 25(1), 33, 194* C D

The original petitioning creditor applied to withdraw the petition made against the respondent at the hearing of the petition. Bank Industri and Teknologi Malaysia Berhad ('the bank') then made an oral application to be substituted with the original petitioner. The application was granted on terms that the bank file an amended petition and re-serve it before it was heard. The respondent now applied to set aside both the order of substitution and service of the amended petition. The issues were: (1) whether the bank had the right to present the petition at the time the original petition was presented; (2) whether the bank was required to have first issued a statutory notice under s. 218(2)(a) of the Companies Act 1965 ('the Act'); (3) whether an oral application for substitution was procedurally correct; (4) whether the High Court in Sabah and Sarawak had the jurisdiction to hear the petition; (5) whether service of the amended petition at the respondent's business address was improper. E F G H

Held (dismissing the application):

(1) The question whether the bank was properly substituted as the petitioner would depend on whether it had satisfied the requirements of r. 33(1) of the Companies Winding-Up Rules 1972 ('the Rules'). Under the said rule, the person I

who seeks to be substituted should be a person who 'would have a right to present the petition.' It should be a right to present the particular petition at the time it is presented, and not at the date the substitution is ordered. A winding-up order, if eventually granted, relates back to the date when the petition is first presented (s. 219(2) of the Companies Act 1965). Therefore, the person who wishes to be substituted as a petitioning creditor must show that at that date he would have a right to present the petition. (paras 7, 8, 9)

(2) In winding-up proceedings, a person is not a creditor of another when the debt is genuinely disputed on substantial grounds, thereby depriving him of the right to present a petition. (para 10)

(3) The respondent was indebted to the bank by 31 July 2004 and by 20 October 2004 the bank had filed a writ of summons against the respondent claiming repayment of the said debt. Further, there was no evidence that the debt was genuinely disputed on substantial grounds. Therefore, when the original petition was presented on 10 November 2004, the bank was a creditor within s. 217(b) of the Act. In any event, it was a contingent and prospective creditor of the respondent and there was no reason why the bank would not have had a right to present the petition on the date it was originally presented. (para 13)

(4) There is no requirement in r. 33 of the Winding-Up Rules 1972 ('the Rules') that a person applying to be substituted as the petitioner should have first issued a statutory notice under s. 218(2)(a) of the Act (*Maril-Rionebel(M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* followed). (paras 21, 22 & 23)

(5) Whether an application for substitution made orally or by way of summons-in-chambers depends on the circumstances in which the application is made. A petitioning creditor may negotiate to be paid by the debtor behind the back of other creditors and then apply to withdraw the petition on the day the petition is called for hearing. In such circumstances, a creditor who has given notice of intention to appear can

immediately make an oral application for substitution in the course of the hearing. A company who owes money to several creditors may pay off the petitioning creditor to avoid a winding-up order. It would be unjust to allow a withdrawal of the petition in such circumstances. On the other hand, where a substitution is sought in less pressing circumstances, for example where the petitioning creditor has delayed in prosecuting the petition, then it is reasonable to expect an application for substitution to be made by way of summons-in-chambers. Accordingly, there is no hard and fast rule on the mode of the application for substitution. In the circumstances, an oral application made by the bank was proper and sufficient. (para 28)

(6) There was no short circuit of the procedures herein before a winding-up order could be made. The order for substitution was granted on terms that required the substituted petitioner to file an amended petition and re-serve it before it was heard. (para 30)

(7) On the respondent's complaint that the respondent did not know that the bank had given notice of intention to appear to support the petition, the rules did not require such notice to be served on the respondent. (para 31)

(8) The respondent could not complain that it was not afforded a right to be heard on the application for substitution when it failed to be present at the hearing of the petition. Nevertheless, by ordering that the petition be amended and re-served on the respondent before it was heard, the respondent was effectively given an opportunity, not only to be heard on the substantive petition for winding-up but also to apply to set aside the order of substitution. (paras 32 & 33)

(9) Since the respondent has a place of business within the local jurisdiction of the High Court Kuching, s. 23(1)(b) of the Courts of Judicature Act 1964 conferred jurisdiction on this court to hear this petition. It was also evident from the Facility Agreement between the parties that the respondent's factory, assets and machinery were situated in Kuching. In the event a winding-up was ordered, the court and the

Director-General of Insolvency's branch office here would be better placed to provide the close supervision required on the winding-up of the respondent. (paras 38 & 39)

(10) Since the respondent did not have a registered office, the bank, by effecting service of the amended petition on the respondent's business address, failed to comply with r. 25(1) of the rules. However, there was no substantial injustice caused to the respondent and r. 194 of the rules was applicable. (paras 42, 43, 44 & 45)

Case(s) referred to:

Ann Joo Metal Sdn Bhd v. Pembenaan MY Chahaya Sdn Bhd [2000] 5 MLJ 709 ***(refd)***

Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd [1990] 1 CLJ 262; [1990] 2 CLJ (Rep) 11 HC ***(refd)***

Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd [1988] 1 CLJ 649; [1988] 1 CLJ (Rep) 618 HC ***(refd)***

Lindeteves-Jacoberg (Malaya) Sdn Bhd v. Electrical Switchgears Automation (M) Sdn Bhd [1989] 5 MLJ 530 ***(dist)***

Mann & Anor v. Goldstein & Anor [1968] 2 All ER 769 ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Others Appeal [2001] 3 CLJ 248 CA ***(foll)***

Mark Jaya Engineering Sdn Bhd v. LFY Construction Sdn Bhd [1990] 1 CLJ 518; [1990] 2 CLJ (Rep) 451 HC ***(refd)***

Morgan Guarantee Trust Co of NY v. Lian Seng Properties Sdn Bhd [1990] 1 CLJ 119; [1990] 2 CLJ (Rep) 498 HC ***(refd)***

MUI Bank Bhd v. Golden Hornbill Hotel Sdn Bhd [1993] 1 CLJ 204 HC

Re Lympne Investments Ltd [1972] 2 All ER 385 ***(refd)***

Taylors Industrial Flooring Ltd v. Matt Plant Hire (Manchester) Ltd [1990] BCLC 216 ***(refd)***

Teck Yew Brothers Hand-Bag Trading Co v. Maharani Supermarket Sdn Bhd [1989] 1 CLJ 258; [1989] 2 CLJ (Rep) 555 HC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 217(b), 218(2)(a), 219(2)

Companies Winding-Up Rules 1972, rr. 25(1), 33(1), 194

Courts of Judicature Act 1964, s. 23(1)(b)

For the substituted petitioner - Albert Tang; M/s Chew Jugah Wan Ullok & Co

For the respondent - Daisy Tham; M/s Tham & Co

For the creditor RHB - SY Chan; M/s Ee & Lim

For Director-General of Insolvency - Suriyati Ismail

Reported by Usha Thiagarajah

JUDGMENT

Clement Skinner J:

[1] When this winding-up petition was called on for hearing on 16 March 2005 the original petitioning creditor HSBC Bank Malaysia Berhad applied to withdraw the petition on the ground that it had been fully paid the amount due to it. The respondent company did not appear at the hearing even though it had been served with notice of hearing. On the court being informed of HSBC Bank's intention, a creditor who was present, namely, Bank Industri & Teknologi Malaysia Berhad ('Bank Industri') and who had filed a notice of intention to appear on the hearing of the petition and to support it, applied orally to be substituted as the petitioner. Pursuant to r. 33 of the Companies Winding-Up Rules 1972 ('the Rules'), I allowed the substitution on the following terms:

(a) The substituted petitioner file an amended petition within 14 days of the order of substitution;

(b) that the amended petition be re-served on the respondent and readvertised in the newspapers in accordance with the Rules;

(c) the petition be heard on 16 June 2005.

Subsequently, the time to file the amended petition was extended to 15 April 2005.

[2] On the amended petition being re-served on it, the respondent filed two applications, namely (i) to set aside the order of substitution; and (ii) to set aside the service on it of the amended petition.

[3] The respondent applied to set aside the order of substitution on the following grounds:

(1) the substituted petitioner did not have the right to present the petition at the time the order of substitution was made on 10 March 2005 or at the time the petition was originally presented or at the time the amended petition was filed or at all;

(2) no statutory notice pursuant to s. 218(2)(a) of the Companies Act 1965 was served on the respondent by the substituted petitioner;

(3) the order of substitution was made irregularly as the substituted petitioner's application for the same failed to comply with rr. 5 and 7 of the Rules;

(4) this court has no jurisdiction to hear the petition as the respondent's registered office is in West Malaysia.

[4] The respondent applied to set aside the service on it of the amended petition on the ground that service was not effected on it in accordance with r. 25(1) of the Rules.

[5] I will now consider the merits of the two applications before me.

Can Bank Industri Be Substituted As Petitioner?

[6] It was the respondent's contention that Bank Industri had no right to apply for substitution on 10 March 2005 because at the date of the commencement of the original winding-up proceedings, which was on 10 November 2004, Bank Industri was not a judgment creditor as it only obtained its judgment against the respondent on 1 February 2005 which is a date well after the date on which the original winding-up proceedings commenced. Accordingly, the respondent contended that Bank Industri would not have had the right to present its petition at the time the original petition was presented and so was not entitled to be substituted as a petitioner under r. 33 of the Rules. In support the case of *Morgan Guarantee Trust Co. of NY v. Lian Seng Properties Sdn Bhd* [1990] 1 CLJ 119 (HC) was cited.

[7] In my judgment the question whether Bank Industri was properly substituted as the petitioner in this case will depend on whether it has satisfied the requirements of r. 33(1) of the Rules. That sub-rule reads:

33 Substitution of any person as petitioner

(1) When a petitioner is not entitled to present a petition or, whether so entitled or not, where he –

(a) fails to take all the steps prescribed by these Rules preliminary to the hearing of the petition; A

(b) consents to withdraw his petition or allow it to be dismissed or the hearing to be adjourned;

(c) fails to appear in support of his petition when it is called on in court on the day originally fixed for the hearing thereof or any day to which the hearing has been adjourned or if appearing does not apply for an order in terms of the prayer in his petition, B

the court may upon such terms as it thinks just substitute as petitioner any person who, in the opinion of the court, **would have a right to present the petition** and who is desirous of proceeding with the petition. (emphasis added) C

[8] In my judgment for the court to exercise the discretion which it has to order a substitution under the rule, it must be satisfied that the person who seeks to be substituted is a person who 'would have a right to present the petition'. D

[9] So, was Bank Industri a person who would have a right to present the petition in this case? In considering this question I accept the preposition made by both Mr. Albert Tang of counsel for the substituted petitioner and Ms Daisy Tham of counsel for the respondent, that the words 'would have a right to present the petition' refer to a right to present the particular petition at the time it was presented, and not at the date the substitution is ordered. Put in another way, the person applying for substitution must be a person who would have had the right to present a petition at the time the original petition was presented. To me that represents the correct position because if a winding-up order is eventually granted, the order relates back to the date when the petition was first presented because s. 219(2) of the Act stipulates that 'winding-up will be deemed to have commenced at the time of the presentation of the petition for the winding-up'. Therefore the person who wishes to be substituted as a petitioning creditor must show that at that date he would have had a right to present the petition. E F G H

[10] In the context of winding-up proceedings, I also accept the proposition that a person is not a creditor of another when the debt is genuinely disputed on substantial ground (see *Re Lympne* I

Investments Ltd [1972] 2 All ER 385 at p. 389), thereby depriving him of the right to present a petition (see *Mann & Anor v. Goldstein & Anor* [1968] 2 All ER 769).

[11] Reverting to the question whether Bank Industri had a right to present the petition on the date it was originally presented, the following chronology of events (revealed in the affidavits and exhibits filed by the parties in this application) are relevant:

23 May 2001	Facility agreement signed between Bank Industri and respondent for Term Loan of RM1 million.
31 July 2004	respondent indebted to Bank Industri by RM906,898.
30 August 2004	Letter of demand sent to respondent requiring payment of RM906,898 within seven days thereof.
20 October 2004	Writ of summons issued by Bank Industri against respondent.
10 November 2004	Petition presented by HSBC Bank Malaysia Berhad.
1 February 2005	Judgment in default sealed against respondent.
10 March 2005	Order of substitution granted.

[12] It will next be convenient to ascertain who in law may present a petition to wind up a company. In this regard s. 217 of the Companies Act 1965 ('the Act') provides:

217 Application to wind-up

(1) A company whether or not it is being wound up voluntarily may be wound up under an order of the court on the petition of:

(a) the company;

(b) **any creditor, including a contingent or prospective creditor of the company;**

(c) a contributory or any person who is the personal representative of a deceased contributory or the trustee in bankruptcy or the official assignee of the state of a bankrupt contributory;

(d) the liquidator;

(e) the Minister pursuant to section 205 or on the ground specified in section 218(1)(d);

(f) in the case of a company which is a licenced institution, or a scheduled institution in respect of which the Minister charged with responsibility for finance has made an order under section 24(1) of the Banking and Financial Institutions act 1989, or a nonscheduled institution in respect of which such Minister has made an order under section 93(1) of that Act, Bank Negara Malaysia;

(g) in the case of a company which is licenced under the Insurance Act 1996, Bank Negara Malaysia;

(h) the Registrar on the ground specified in section 218(1)(m) or (n),

or any two or more of those parties. (emphasis added)

[13] The respondent says that since Bank Industri only obtained its judgment on 1 February 2005, it would not have had a right as such 'judgment creditor' to present its petition on 10 November 2004 which was the date the original petition was presented. I do not agree. It is not only a 'judgment creditor' who may present a winding-up petition against a company. Section 217 (b) of the Act makes it very clear that any creditor, including a contingent or prospective creditor of the company may present a petition to wind up a company. Here, it is my view that Bank Industri was clearly a creditor of the respondent. By 31 July 2004 the respondent was already indebted to it for RM906,898 under the facility agreement dated 23 May 2001. Further by 20 October 2004 Bank Industri had already filed a writ of summons against the respondent claiming the repayment of the liquidated amount of RM906,898. There is no evidence that the debt was genuinely disputed on substantial grounds. Accordingly, at the date when the petition was originally presented, Bank Industri was, in my view, a person coming within the meaning of a creditor in s. 217(b) of

A the Act, and in any event it was a contingent and prospective creditor of the respondent. So there was no reason why Bank Industri would not have had a right to present the petition on the date it was originally presented.

B **[14]** With regard to the *Morgan Guarantee* case which was relied on by the respondent, I find that case distinguishable. First the debt there only crystallised well after the commencement of the winding-up petition. VC George J (as he then was) said at p 124:

C > The crystallisation that KSY relies on could only come about when the agreed 18 month period was completed, which was well after the date of presentation of the petition.

[15] Secondly, the respondent in that case had a substantial cross-claim against the creditor which had yet to be tried. The D learned judge there took the view that the petitioner there could not be recognised as a supporting creditor by applying the principle that where a company has a substantial cross-claim against the creditor which had yet to be tried, the petitioning creditor would have to wait till the cross-claim is tried before it E can petition to wind up the respondent. Thirdly, the basis upon which the decision in that case was arrived at is summarised in the following passage at p. 177 of that judgment:

F > Accordingly, as the two judgments on which KSY initially founded its right to be a supporting creditor have turned out to be not on a sound basis and as the right to the agreed sum had not crystallised prior to the date of the presentation of the petition herein and in any event as the debtor has a substantial cross-claim against KSY in my judgment KSY cannot be recognised as a supporting creditor.

G **[16]** The facts here are clearly different where the debt in the present case crystallised before the original petition was presented. As at 31 July 2004 the respondent was already indebted to Bank Industri. In fact Bank Industri had already issued a writ for the amount payable to it, before the original petition was filed on 10 H November 2004. Bank Industri clearly did so as a creditor of the respondent. Besides, unlike in *Morgan Guarantee*, there is no cross-claim involved in this. Further, the debt in this case has not been disputed and neither has there been any attempt to set aside the default judgment in this case. I

[17] Ms Tham also referred me to *Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd* [1988] 1 CLJ 649; [1988] 1 CLJ (Rep) 618 where Zakaria Yatim J (as he then was) struck out a winding-up petition on the ground that the petitioning creditor had no *locus standi* to present the petition because it was not a creditor since on the facts of that case, the respondent company was able to show that the alleged debt was seriously disputed on substantial grounds.

[18] I do not find that case of any assistance here where the question whether Bank Industri is a creditor arises in the context of an application for substitution and where the respondent in coming forward to set aside the order of substitution does not do so on the basis that the debt is seriously disputed on substantial grounds.

[19] It was next argued by the respondent that the facts which are relied upon by the substituted petitioner as forming the basis of its application for substitution must have existed at the date of commencement of the original winding-up petition, and not subsequently, as was the case here, as according to the respondent, the substituted petitioner only obtained its judgment against the respondent on 1 February 2005, which was well after the order of substitution was granted. I see nothing in this point. I agree with Mr. Tang of counsel for the substituted petitioner that this is a non issue given that the facts which formed the basis of the substituted petitioner's application were already in existence prior to the presentation of the original winding-up petition.

No Statutory Notice Served Pursuant To s. 218(2)(a) Of The Act?

[20] It was contended by the respondent that in para. 8 of the amended petition, the substituted petitioner relies on a presumption of inability of the respondent to pay its debts as the ground on which it seeks to wind up the respondent. However, according to the respondent, such a presumption can only arise in one way, that is, pursuant to s. 218(2)(a) of the Act, by neglecting to pay a debt after service of the statutory notice mentioned in the section.

[21] I find no substance in this contention. The critical question for decision before the court is whether Bank Industri is the person who 'would have a right to present the petition'. The

court is not at the present moment concerned with the circumstances in which a company may be wound up by the court, which is a matter covered by s. 218 of the Act and which is a matter which the court must address at the hearing of the substantive application for winding-up. As far as the order of substitution is concerned, there is no requirement in r. 33 of the Rules that a person applying to be substituted as the petitioner should have first issued a statutory notice under s. 218(2)(a) of the Act. I agree with Mr. Tang that to insist upon Bank Industri doing so, would be to read into r. 33(1) a provision, which is not there.

[22] I was also referred by Mr. Tang to the case of *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Others Appeal* [2001] 3 CLJ 248 where the Court of Appeal (per Gopal Sri Ram JCA) said at p. 260-261 of its judgment that while a winding-up petition is normally based on the inability of a company to pay its debts as and when they fall due and that such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s. 218 of the Act, yet the issuance of a statutory notice under s. 218 of the Act is not a *sine qua non* for the presentation of a winding-up petition. According to the Court of Appeal, what was needed is compelling evidence of the company's inability to pay its debts as and when they fall due. In *Maril-Rionebel* the Court of Appeal referred to two cases in support of its view, namely, *Teck Yew Brothers Hand-Bag Trading Co. v. Maharani Supermarket Sdn Bhd* [1989] 1 CLJ 258; [1989] 2 CLJ (Rep) 555 and *Taylors Industrial Flooring Ltd v. Matt Plant Hire (Manchester) Ltd* [1990] BCLC 216. The Court of Appeal pointed out that in *Taylor*'s case the winding-up petition was presented and prosecuted despite the absence of a notice under the English equipollent of s. 218 of our Act. The rationale behind not issuing such a notice is given in the judgment of Dillon LJ at p. 219 of the report where he said:

> There is no requirement that a creditor must serve a statutory demand. The practice for a long time has been that the vast majority of creditors who seek to petition for the winding-up of companies do not serve statutory demands. The practical reason for that is that if a statutory demand is served, three weeks have to pass until a winding-up petition can be presented. If, after the petition has been presented, a winding-up order is made, the winding-up is only treated as commencing at the date of the

> presentation of the petition; thus, if the creditor takes the course of serving a statutory demand, it would be giving the company an extra three weeks' grace in which such assets of the company may have, may be dissipated in attempting to keep an insolvent business afloat, or may be absorbed into the security of a debenture holder bank. So there are practical reasons for not allowing extra time, particularly where commercial conditions and competition require promptness in the payment of companies' debts so that the creditor companies can manage their own cash flow and keep their own costs down.

[23] I respectfully agree with what was stated by the court in *Maril-Rionebel* and *Taylor*'s case.

[24] Ms Tham of counsel for the respondent referred me to the case of *Lindeteves-Jacoberg (Malaya) Sdn Bhd v. Electrical Switchgears Automation (M) Sdn Bhd* [1989] 5 MLJ 530. That case also concerned an application to substitute a petitioning creditor. It was refused. In doing so Abdul Aziz J (as he then was) held that where an intending petitioner depends on the presumption under s. 218(2)(a) as proof of the debtor company's inability to pay its debts, the petitioner would have no case to bring until the presumption has arisen after the statutory notice has been issued and served and the company has for three weeks failed to satisfy the demand of the statutory notice. The learned judge said at p. 531:

> Until the presumption arises, the intending petitioner would have no cause of action to be qualified to present a petition. It must follow that he would have no cause of action to qualify to be substituted as a petitioner under r. 33(1).

[25] I find that case distinguishable. In that case counsel for the intended petitioner informed the court that he relied solely on a presumption of the respondent's inability to pay its debts as the basis for substitution, but the intended petitioner had not yet issued its statutory notice under s. 218 of the Act at the time the application for substitution. That is not the case here, where Bank Industri says it is a creditor within the meaning of s. 217(b), for the reasons discussed earlier. Quite apart from what I have said, the decision of the Court of Appeal in the *Maril-Rionebel* case shows that the issuance of a s. 218 notice is not a *sine qua non* for the presentation of a winding-up petition.

A **Oral Application For Substitution Procedurally Incorrect?**

[26] It was next contended by the respondent that procedurally, the application for substitution ought to have been made by way of summons-in-chambers supported by an affidavit because rr. 5 B and 7 of the Rules provides that all applications to court shall be made by summons or motion and shall be served on every person against whom an order is sought not less than two days before the date of hearing. The respondent says this was not done in this case. The respondent further said that it did not even know C that Bank Industri intended to appear at the hearing of the petition to support it, as it had not been served with a copy of the notice of intention to appear.

[27] The respondent further complained that since the order of D substitution was obtained in its absence and without any prior notice given to it, the order was obtained in breach of the rules of natural justice and was highly irregular. According to the respondent, the irregularity was fundamental and not curable as the effect of the breach and noncompliance with the rules was to E defeat its substantive rights. Accordingly the respondent contended that the order of substitution should be set aside *ex-debito justitiae.* I see absolutely no merit in these contentions.

[28] In the first place, the rules should be interpreted in a sensible way so as to result in fairness to the parties. In my F judgment, whether an application for substitution may be made orally or should be made by way of a summons-in-chambers will depend on the circumstances in which the application is made. If a petitioning creditor negotiates to be paid by the debtor behind the back of other creditors and then applies to withdraw the G petition on the day the petition is called on for hearing, I do not see any good reason why a creditor who has given notice of intention to appear cannot immediately apply orally for substitution in the course of the hearing. Indeed if a company owes money to several creditors but to stave off a winding-up order it pays off H the petitioning creditor, it would be unjust to allow a withdrawal of the petition in such circumstances. On the other hand, where a substitution is sought in less pressing circumstances, such as for example, that the petitioning creditor has delayed in prosecuting the petition, then it is reasonable to expect an application for I substitution to be made by way of summons-in-chambers.

Accordingly it is my view that there can be no hard and fast rule on the mode of the application for substitution. In the circumstances in which the application for substitution came to be made in this case, I find that an oral application was proper and sufficient.

[29] Ms Tham referred me to the case of *Mark Jaya Engineering Sdn Bhd v. LFY Construction Sdn Bhd* [1990] 1 CLJ 518; [1990] 2 CLJ (Rep) 451 where Abu Mansor J (as he then was) refused an oral application for substitution because on the facts in that case, it would not have been just to do so. The learned judge observed in that case that if substitution was allowed, 'the first judgment creditor would be able thereby to short circuit the whole of the procedures incumbent on a petitioner to adhere to and comply with before a winding-up order could be made and had'.

[30] However, I do not find that a 'short circuit of the whole procedures' has occurred here by the oral application for substitution because the order for substitution was granted on terms which require the substituted petitioner to file an amended petition and re-serve it before it is heard.

[31] With regard to the respondent's complaint that it did not even know that Bank Industri had given notice of intention to appear to support the petition, I see nothing in this complaint. The rules do not require such notice to be served on the respondent.

[32] With regard to the respondent's complaint that there has been an alleged breach of the rules of natural justice as it was not afforded a right to be heard on Bank Industri's application for substitution, I find the respondent's complaint misconceived. The respondent was served with the notice of hearing of the petition. If the respondent had wished to be heard on any matter that might arise at the hearing, it should have been present (through its counsel) at the date appointed for hearing the petition. If the respondent had done so it would have had an opportunity to be heard on application for substitution. It lies ill in the mouth of the respondent to complain of not being afforded an opportunity to be heard when it was not even bothered to appear on the date appointed for the hearing of the petition.

[33] Be that as it may, when I allowed Bank Industri's application for substitution, I did so on the terms earlier mentioned. By ordering that the petition be amended and re-served on the respondent before it is heard, the respondent was effectively given an opportunity, not only to be heard on the substantive petition for winding-up, but also to apply to set aside the order of substitution. Accordingly I find the respondent has no cause to complain on this ground.

Has The High Court In Sabah And Sarawak Jurisdiction To Hear This Petition, And Forum Non Conveniens?

[34] It was contended by the respondent that since its registered office is situated in Selangor Darul Ehsan, it is resident there and therefore within the local jurisdiction of the High Court of Malaya and not that of the High Court of Sabah & Sarawak. That being the case, jurisdiction to hear this petition lies with the High Court of Malaya, not with this court.

[35] Alternatively the respondent submitted that the High Court of Malaya is the forum of convenience. The respondent says this is so because in winding-up proceedings, close supervision is required by the court and the Director-General of Insolvency (DGI). According to the respondent such close supervision can only be effectively done by the court and the branch of the DGI within the locality of the registered office of the respondent. So the respondent says it would not be feasible for the High Court in Kuching or the DGI's branch office at Kuching to undertake these responsibilities. In support the case of *Dayasar Corp Sdn Bhd v. C.P. Ng & Co. Sdn Bhd* [1990] 1 CLJ 262; [1990] 2 CLJ 11 (Rep) was cited.

[36] I see nothing in the points taken. As far as jurisdiction is concerned, s. 23 of the Courts of Judicature Act 1964 ('the CJA') states that:

Civil jurisdiction – general

(1) Subject to the limitations contained in Article 128 of the Constitution the High court shall have jurisdiction to try all civil proceedings where –

(a) the cause of action arose;

(b) the defendant or one of several defendants resides or has his place of business;

(c) the facts on which the proceedings are based exist or are alleged to have occurred; or

(d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

(2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

[37] It is well accepted that sub-sections (a) to (d) of s. 23 CJA are to be construed disjunctively.

[38] Although the respondent says its registered office is situated in Selangor Darul Ehsan, when it entered into the facility agreement it declared that it is 'a company incorporated in Malaysia under the Companies Act 1965 and having its business address at Lot 1198, Block 12, Samajaya Free Industrial Trade Zone, Jalan Muara Tabuan, 93450 Kuching, Sarawak'. Since the respondent has a place of business within the local jurisdiction of the High Court Kuching, s. 23(1)(b) of the CJA confers jurisdiction on this court to hear this petition.

[39] It is also evident to me from the facility agreement that the respondent's factory as well as its assets and machinery are situated in Kuching. In the event a winding-up is ordered, it is by the court here and the DGI's branch office here which will be better placed to provide the close supervision required on the winding-up of the respondent. The respondent has not made any attempt to disclose what, if any, assets or other properties it owns in West Malaysia which would make it more practical and convenient for the winding-up court and branch office of the DGI's office there to supervise, in the event an order of winding-up is made.

A **Should Service Be Set Aside?**

[40] The amended petition was re-served on the respondent at its business address at Lot 1198, Block 12, Samajaya Free Industrial Zone, Jalan Muara Tabuan, 93450 Kuching. In the B facility agreement this address is described as its business address. Service was effected at that address by leaving a copy of the amended petition with an officer of the company, namely, Madam Chak Lee Yee, a director of the respondent. Such service was effected on 24 May 2005.

C **[41]** The respondent has now come forward to set aside the service on it of the amended petition on the ground that service was not effected on it at its registered office as required by r. 25(1) of the Rules. According to the respondent it is only if it D does not have a registered office that service may be effected on it at its business address. Rule 25 of the Rules states:

> Every petition shall, unless presented by the company, be served upon the company at the registered office of the company, and if there is no registered office, then at the principal or last known E principal place of business of the company, if can be found, by leaving a copy with any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at the registered office or principal place of business, or by serving it on such member or members of the company as the court may direct; and where F the company is being wound up voluntarily, the petition shall also be served upon the liquidator (if any) appointed for the purpose of winding-up of the affairs of the company. The affidavit of service of the petition may be in Form 5 or 6.

G **[42]** Since the respondent does have a registered office, I do not think it can be denied by Bank Industri that in effecting service of the amended petition on the respondent at its business address instead of at its registered address, there has been non-compliance with r. 25(1) of the Rules which gives rise to an irregularity H regarding service. But the crucial question that must be asked is this:

[43] What is the effect of such non-compliance or irregularity? Ms Tham of counsel for the respondent submitted that winding-up is a draconian remedy as it seeks to terminate the existence of a I company against the will or wishes of its officers, staff and

members. Accordingly she submits that the winding-up rules must be adhered to strictly, as any non-compliance with the rules of service would work an injustice.

[44] In my judgment to decide the issue at hand, useful reference may be made to r. 194 of the Rules which states that:

> No proceeding under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court.

[45] So what substantial injustice was caused to the respondent by being served the amended petition at its business address and not its registered address? I do not think there has been any. In the first place, it has been said that the object of service of process is to bring the proceedings to the notice of the person being served and whatever mode is used, there must be a reasonable probability that this object will be achieved. In the *Malaysian High Court Practice 2001* Desk Edition there appears this commentary about service at p. 2024:

> The whole purpose of servicing a writ and statement is to make a defendant aware of the fact that legal proceedings have been commenced against him and that he is entitled within the time limited in the writ, to enter an appearance and make his defence but in default of him doing so, the plaintiff may proceed to enter judgment and levy execution against him. ... It seems that the courts are inclined to interpret the rule liberally. Once it is proved that the defendant was aware of the proceedings against him, the court will recognise service of documents as such is within the methods prescribed by the rules.

[46] In my view what was stated there is no less applicable in the case of service under the winding-up rules.

[47] In the second place, this is not a case where a winding-up order has resulted from service which did not strictly comply with the rules (as was the case in *MUI Bank Bhd v. Golden Hornbill Hotel Sdn Bhd* [1993] 1 CLJ 204 where Chong Siew Fai J, (as he then was) set aside a winding-up order made for want of good service). Here the respondent was well aware of these proceedings, and has applied to set aside the order of substitution.

[48] Accordingly I find this a suitable case to apply r. 194 of the rules by curing the irregularity by an appropriate order regarding costs. In doing so I associate myself with what was expressed by Abdul Wahab Patail J, in *Ann Joo Metal Sdn Bhd v. Pembenaan MY Chahaya Sdn Bhd* [2000] 5 MLJ 709 at p. 715, where the learned judge said:

> In my view the provisions as to service at the registered office cannot be intended as a shield for a company to plead that service was not made to its registered address as a defence when in fact it has received the notice and petition, and has not shown any prejudice in its defence not being served at its registered office.

[49] In the result I dismiss the respondent's application to set aside the order of substitution (in encl. 68) with costs. I also dismiss the respondent's application to set aside service of the amended petition (in encl. 101) but order that each party is to bear its own costs.